Filed 3/26/09 P. v. King CA1/2

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. DONALD WAYNE KING, Defendant and Appellant.	A121371 (San Mateo County Super. Ct. No. SC065059A)

After a jury found him guilty of robbing two boys at knifepoint, defendant Donald King was sentenced to eight years in state prison. His defense, rejected by the jury, was that he won the boys' money in a game of three-card monte, after which the boys—angry at having lost their money to a card shark—falsely reported to the police they had been robbed. During trial, defendant requested that he be permitted to demonstrate three-card monte for the jury, which the trial court allowed him to do, although he was prohibited from using playing cards during the demonstration.

On appeal, defendant contends the trial court abused its discretion when it denied his request to demonstrate the game of three-card monte using playing cards. Finding no abuse of discretion, we affirm.

BACKGROUND

By amended information filed February 11, 2008, the district attorney of the county of San Mateo charged defendant with robbery and attempted robbery, both involving the use of a deadly or dangerous weapon, namely a knife. The amended information also alleged eleven prior felony convictions and six prior prison terms.

The alleged priors were bifurcated for a separate trial, and on February 19, 2008, a jury trial on the robbery charges and weapons enhancements commenced. After the case went to the jury, defendant waived his right to a jury trial on the priors.

On February 20, 2008, the jury returned a guilty verdict on both counts and found the knife allegations to be true. A court trial on the priors followed, with the court finding the prior allegations to be true.

On April 11, 2008, defendant was sentenced to eight years in state prison.

This timely appeal followed.

EVIDENCE AT TRIAL

Prosecution's Case

On the afternoon of October 29, 2007, friends Brandon Behravesh and Andrew Chen, who were sixteen and seventeen years old, respectively, at the time of trial, drove in Behravesh's car to a store in Redwood City to purchase items for their Halloween costumes. After buying what they needed, they returned to the car to drop off their purchases, intending to continue on to another store around the corner.

As Behravesh was walking away from his car, defendant approached. He was holding out three playing cards and asked Behravesh if he wanted to gamble. Behravesh responded "No," and defendant asked if he was sure. When Behravesh responded that he was sure, defendant pulled out a knife and demanded money. Afraid he was going to be stabbed, Behravesh took three 20-dollar bills from his back pocket and gave them to defendant.

Just then, Chen, who had been talking on his cell phone by the car, walked up and saw defendant pointing a knife at Behravesh with one hand and holding money in his other. Defendant turned to him and said, "How about you?" Chen, who was afraid for his life, pulled out his wallet and showed defendant that he did not have any money. Defendant said, "Thank you for the starting investment," and walked off.

Behravesh testified at trial that he thought defendant had a folding knife because he recalled hearing a click. When shown a knife found on defendant at the time of his arrest, Behravesh testified that it made the same clicking sound he remembered hearing

during the robbery. Chen testified that the knife produced during trial was similar to the knife defendant wielded that day.

After defendant walked off, the boys searched, first on foot and then by car, for a meter maid they had seen earlier in order to find out how to get to the police station. Unsuccessful, they went into a bank and asked a security guard. The guard gave them directions to the police station but they got very lost, finally calling 411 to get the address. The global positioning system in Behravesh's car then guided them to the police station. They did not call 911 from their cell phones because doing so would have put them through to the California Highway Patrol, which would not have helped in their situation.

Once at the police station, Behravesh and Chen reported to Officers John Silva and Steven Barker what happened. They provided a detailed description of defendant, and told the officers that defendant had cards that were creased lengthwise and a folding knife. The boys then returned home.

Later that evening, Barker received a lead regarding someone matching defendant's description at the Pacific Euro Hotel, which was in the immediate vicinity of where the robbery occurred. When Barker and Silva arrived at the hotel, they spotted defendant walking away.

The officers approached defendant and asked him about his encounter with Behravesh and Chen. Defendant produced three playing cards, each of which had a fold lengthwise down the middle.[1] Barker also found a folding knife and $57 in defendant's pants pocket.

At around 9:30 p.m. that evening, Behravesh received a call from a Redwood City police officer requesting that he come make an identification. Behravesh drove to where defendant was being detained and, after being read an admonition,

[1] Barker explained at trial that this crease allows cards to be quickly manipulated when they are face-down on a surface.

identified defendant as the individual who robbed him, saying "That's him. Oh, my God, that's him. I can't believe you found him."

Defendant's Request To Demonstrate The Game Of Three-Card Monte

Following the conclusion of the prosecution's case-in-chief, defendant requested that as part of his defense he be permitted to demonstrate for the jury how he plays the game of three-card monte. In support of the request, defense counsel argued: "It's relevant in that Mr. King needs the jury to understand this is what he did. This is what he does. This is why these two young men left without some of their money. [¶] . . . [H]e was going through a very well rehearsed, very orchestrated routine by which he plays the game and leaves with their money. [¶] It's also noteworthy that the two young men apparently felt so violated at the time that it took them two hours to report the incident. They attempted to explain it, possibly. The inference is that they were sufficiently rattled and they didn't know what to do and drove around in circles. And it took them well over two hours to get around to reporting it because they were that upset. [¶] It's also possible from an inference that after feeling and waiting that the game is rigged, they were ripped off, they decided another way to report it perhaps to have a bigger impact. I think that creates a necessary inference or necessary showing to the jury that, at a minimum, he knows the game. He knows how to play it. He's very capable of making it look benign and then showing it very quickly, which is how he separates people from their money."

When the court expressed doubt that whether or not defendant was good at the game was relevant, defense counsel responded, "I think the issue isn't limited to and separated to whether he could move his hands fast enough. The issue that I think the jury needs to see is the totality of his being able to not only demonstrate the game, but sell it, how quickly he could draw somebody in to him, move his hands for a matter of seconds, and walk away with their money. That's why it's relevant."

The prosecutor objected to defendant demonstrating the game for the jury, explaining, "The People feel that everything that the [d]efendant wishes to communicate to the jury can be communicated through testimony without the need to resort to a demonstration that cannot be properly preserved on the record. [¶] People's concern is

that the demonstration is going to give more credence to a defense that, at least according to the People, is not a valid one given the victims' testimonies here today and that it would serve more as a distraction than it would assist the jury in actually focusing on what the issue really is. [¶] The issue is not: Can Mr. King play three-card monte or not? The issue is: Is that what happened back on October 29th of '07? And it is a game that is fascinating, that does draw interest, that has the potential to distract. So People would object."

When asked by the court to address the "speed issue," the prosecutor responded, "[Defendant] can simply testify it takes five seconds to play three-card monte. Just don't see the need for a demonstration. I don't believe that that has been shown to the Court."

Defense counsel countered that a narrative would not convey that "by simply moving his hands around with cards, [defendant] could so rapidly separate [the boys] from their money he didn't need the weapon. And there's no description he could give that could adequately portray that."

The court responded: "Well, I don't think it's a question of whether he needed the weapon or not . . . . It's a question of whether the victims agreed to gamble or didn't. Those are the issues in this case. And the other issue is of course, you know: when did he hone his [s]kills? Has he honed them since this event took place? There's lots of other issues. [¶] Only conceivable relevance which I don't know how it could be shown on the record is the speed with which it was done. And we cannot adequately reenact it."

The court then denied defendant's request: "I don't see how it can be done on the record. I don't see how a demonstration is more relevant than it is likely to mislead the jury. I don't see how this scene could be duplicated. [¶] For all of those reasons, I'm going to deny your request for a demonstration. The defendant can certainly describe his interaction with the victims. But actual use of the cards will be prohibited by the court." When asked for clarification, the court explained, "I'm just ruling he can say what he wishes. He can move his hands in the movement. And even standing at the witness chair, he can move his hands in a way that is similar to the way that he is describing. I'm going to make sure that there aren't any items around the witness chair that could be a

problem for that. And with that, that is my ruling, is simply that he has to—that he may not use the cards for a demonstration."

Defendant's Case

Defendant then took the stand as the sole witness on his behalf. He testified as follows:

On the afternoon of October 29, 2007, defendant dropped a friend off in front of the Pacific Euro Hotel, parked his car nearby, and was walking back toward the hotel when he spotted Behravesh and Chen. He thought they looked like "two logical gamblers" or "two good ones," so he approached them with his cards—two fives of spades and an eight of hearts—and asked, "Have you seen me do the Ack-N-Sac?"[2] Chen did not respond, but Behravesh seemed interested, asking, "What's that?" Defendant dropped the cards to the ground and manipulated them for "about two seconds." He explained that the object was for him to hide the red card and for them to find it, saying, "If you could point to the lucky red, you're a 20 buck winner." Behravesh put up 20 dollars but he picked a black card, so defendant took the money.

Chen declined to play, so defendant told Behravesh he could play again and attempt to win his money back. Behravesh only put up 10 dollars this time, but again he lost. He did not get upset but simply said, "It's all I can afford," so defendant continued on his way toward his hotel room. If Behravesh had been upset or said he wanted his money back, defendant would have returned it because it is easier to do that than to have problems, like being falsely accused of robbery. By defendant's estimate, the entire encounter lasted three minutes.

At this point in his testimony, defendant then demonstrated three-card monte by moving his hands without using cards while narrating what he was doing. He explained that when playing the game on the streets, his objective is to do it as fast as possible.

[2] Defendant testified that he thought Behravesh and Chen were at least 20 years old, claiming that if he had known they were underage, he would never have approached them.

Returning to the events of that afternoon, defendant then went back to the hotel, checked in, and stayed in his room for at least two hours. He then came back downstairs, walked into the lobby, and saw a police car in the middle of the street. He did not think anything of it because he assumed the police were there in response to a domestic disturbance. He walked outside, not making any attempt to avoid the police.

As he was walking, an officer stopped him and asked for identification. Officer Silva then approached and said something about a robbery. Defendant denied knowing anything about a robbery, but asked, "Well, you're not talking about three-card monte, are you?" He then gave the officer his version of the encounter with Behravesh and Chen. Defendant had the cards in his pocket and he showed Silva how Behravesh lost his money. Defendant denied ever showing the boys a knife, testifying, "[T]o this day, for the life of me, I can't think of how they guessed up on me having a knife from my pocket. Nowhere on earth they could have seen a knife."

At trial, defendant denied having told Silva that the boys approached him. He also testified that although he won 30 dollars from Behravesh, he may have told Silva it was 20 dollars because he was focused on conveying that there was no argument over the winnings, rather than on the amount he won. Defendant also acknowledged that after the encounter but before being contacted by the police, he spent some money at a store.

Defendant admitted having previously been convicted of theft, eight separate counts of writing checks on insufficient funds, and two counts of giving a false name to a police officer.

Prosecution's Rebuttal

On redirect, Officer Barker confirmed that when defendant gave a statement to the officers at the police station, he stated the boys had initiated contact with him and that he had won $20. Although defendant testified in court that he played two games with Behravesh, he told the officers he had only played one. He also told the officers that he had not shown the boys the cards before they approached him and he could not explain why the boys would approach him and ask if he wanted to play cards if they had not even

seen him with cards. When the officers asked how the boys knew defendant had a knife if he never showed it to them, he said it must have been a lucky guess.

ANALYSIS

Defendant argues one issue on appeal: that the trial court erred in denying his request to demonstrate for the jury how the game of three-card monte is played using actual playing cards. It is a ruling that we review for abuse of discretion (*People v. Gilbert* (1992) 5 Cal.App.4th 1372, 1388), and we conclude there was no such abuse here.

A demonstration is admissible at trial only where "(1) the demonstration is relevant, (2) its conditions and those existing at the time of the alleged occurrence are shown to be substantially similar and (3) the evidence will not consume undue time or confuse or mislead the jury. [Citation.] The party offering the evidence bears the burden of showing that the foundational requirements have been satisfied. [Citation.] The determination whether to admit demonstration evidence requires the trial court to decide whether the evidence is 'of any value in aiding the jury.' [Citation.]" (*People v. Gilbert, supra,* 5 Cal.App.4th at pp. 1387-1388.)

Defendant failed to satisfy his burden of establishing the above-noted foundational requirements for the admissibility of the demonstration. First and most significantly, defendant failed to show that the demonstration was relevant. As defense counsel argued at trial and as defendant reiterates here, it was his theory of the case that the boys fabricated the robbery story because they were angry at having been taken by a "slick, fast-dealing card shark." Defendant therefore sought to demonstrate the game of three-card monte to show how quickly and easily he "duped" the boys. According to defendant, "A reenactment using the cards was the only effective way to present this evidence." However, like the trial court below, we fail to see how defendant's alleged skill at playing three-car monte was relevant to the robbery charges. The issue before the jury was whether defendant robbed the boys on the day in question, or whether they had agreed to gamble. Whether defendant was a skilled card shark or a novice one had no bearing on that question. Defendant was permitted to move his hands as if he were

playing three-card monte and describe what he was doing. This was sufficient to convey his defense to the jury.

To be sure, courts have recognized that reenactments may assist the jury in understanding a witness's testimony and may be relevant to a defendant's theory of the case. Defendant cites multiple cases wherein a reenactment was relevant. For example, in *People v. Cook* (1940) 15 Cal.2d 507, 512, the prosecutor introduced a motion picture of a "purported reenactment by defendant of the several incidents which related to the assault." And in *People v. Harrison* (2005) 35 Cal.4th 208, 233-234, the prosecutor was permitted to introduce a videotape reenactment of the route to the scene of the crime because it "could assist the jury in understanding and evaluating [the witness's] testimony." These and other similar cases are of no avail to defendant, however, because in those cases, the reenactment was relevant to an understanding of the witness's testimony. Not so here: the speed at which defendant could play three-card monte using actual playing cards was simply of no import.

Further, the trial court rightly expressed concern that the demonstration would prove a distraction to the jury. There existed a very real possibility that the jury would have been intrigued by the spectacle of the con game itself, which would have distracted them from the only relevant question before them: did defendant rob the boys?

Finally, there was no way to verify that the manner in which defendant sought to reenact the game during trial was substantially similar to the manner in which he purportedly played it with Behravesh. The encounter happened on October 29, 2007. Defendant testified at trial nearly four months later. In October, defendant could have been a novice card shark with little card playing experience but who, with four months of practice, became proficient by February 2008. Under these circumstances, a demonstration would have been very misleading.

In light of the foregoing, it did not constitute an abuse of discretion for the trial court to deny defendant's request to demonstrate the game of three-card monte using playing cards.

DISPOSITION

The judgment of conviction is affirmed.

_____
Richman, J.

We concur:

_____
Kline, P.J.

_____
Haerle, J.